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June 28 2007

OVERNIGHT DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
E 9300 Hampton Drive
Capital Heights, MD 20743

RE: I/M/O Petition for Waiver of Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies
WC Docket No.07-31, DA 07-2367

Dear Secretary Dortch:

The New Jersey Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") hereby files the enclosed Application for Review in the above proceeding. Enclosed are an original and five copies. Please stamp one copy and return in the enclosed envelope.

Very truly yours,

Kimberly K. Holmes, Esq.
Acting Director

By: _____
Christopher J. White, Esq.
Deputy Public Advocate

Certificate of Service

On this 28th day of June 2007, I served by overnight delivery a copy of the Application for Review on the following:

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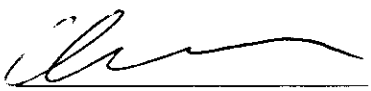

Christopher J. White, Esq.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter	)	
	)	
Petition for Waiver of the Commission's Price Cap Rules for Services Transferred From VADI to the Verizon Telephone Companies	)	WC Docket No. 07-31 DA 07-2367

APPLICATION FOR REVIEW FILED BY THE NEW JERSEY DIVISION OF RATE COUNSEL

RONALD K. CHEN
PUBLIC ADVOCATE OF NEW JERSEY

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June 28, 2007

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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	)	
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Petition for Waiver of the Commission's Price Cap Rules for Services Transferred From VADI to the Verizon Telephone Companies	)	WC Docket No.07-31
	)	DA 07-2367
	)	

APPLICATION FOR REVIEW FILED BY THE NEW JERSEY DIVISION OF RATE COUNSEL

INTRODUCTION

The New Jersey Department of Public Advocate, Division of Rate Counsel ("Rate Counsel")[1] hereby files this Application for Review ("AR") in accordance with Section

[1] / Effective July 1, 2006, the New Jersey Division of the Ratepayer Advocate is now Rate Counsel. The office of Rate Counsel is a Division within the New Jersey Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jersey citizens who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Whitman's Reorganization Plan. See New Jersey Reorganization Plan 001-1994, codified at *N.J.S.A.* 13:1D-1, et seq. The mission of the Ratepayer Advocate was to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that were just and nondiscriminatory. In addition, the Ratepayer Advocate worked to insure that all consumers were knowledgeable about the choices they had in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (*N.J.S.A.* 52:27EE-1 et seq.). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest," *N.J.S.A.* 52: 27EE-57, i.e., an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." *N.J.S.A.* 52:27EE-12; The Division of Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters. The Division of Rate Counsel represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates in Federal and state administrative and judicial proceedings.

1.115 of the Federal Communications Commission's ("Commission's") rules.[2] Rate Counsel seeks review of the Order by the Chief, Pricing Policy Division, Wireline Competition Bureau ("Bureau"), adopted and released on June 6, 2007, in which the Bureau granted Verizon's request for a limited waiver of section 61.42(g) for purposes of the 2007 annual access tariff filing.[3]

EXECUTIVE SUMMARY

For the reasons discussed below, the Ratepayer Advocate submits that the Bureau's decision should be vacated because (1) the Bureau exceeded its authority under sections 0.291(a)(2) by the grant of six successive waivers that has the effect of changing the price cap regime that can only be done by the Commission under section 0.291(e), (2) Verizon failed to submit empirical evidence to support its request for a temporary extension of the waiver of § 61.42(g) for the 2007 annual access tariff filing, (3) Verizon failed to submit any evidence and the record fails to show good cause for the grant of the waiver, and, (4) the *Order* is not supported by substantial evidence and lacks a reasoned basis and is otherwise arbitrary and capricious.[4]

Rate Counsel respectfully asks that the Commission issue to:

(1) vacate the *Order*,

(2) direct the Bureau to suspend, investigate and issue an accounting *Order* for Verizon's 2007 annual access tariffs filing and initiate an

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[2] / *See* 47 C.F.R. § 1.115.

[3] / *I/M/O Petition for Waiver of the Commission's Price cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, WC Docket No. 07-31, Order adopted June 6, 2007 ("*Order*").

[4] / Rate Counsel acknowledges that the arguments contained in this AR are similar, if not the same, as contained in the AR it filed with respect to the same waiver request by Verizon a year ago. However, that AR, and the issues it raises, remains unaddressed by the Commission and the serial waivers by the Bureau have become, unfortunately, an annual event.

investigation as to whether *exogenous* adjustments are necessary due to the regulatory changes implemented since 2001 and to remedy the error in granting serial waivers, thereby correcting harms to consumers from the grant to Verizon of perpetual waivers, and

(3) grant such other relief as the Commission deems appropriate.

BACKGROUND

On November 30, 2001, Verizon filed a petition for waiver of: (a) Section 61.42(g), in *Order* to exclude its advanced services from price cap baskets; and (b) Section 61.38, so that it may file tariff modifications without cost support; and (c) Section 61.49, so that it may file tariff transmittals without certain supporting information. On September 26, 2001, the Commission granted Verizon's request to re-integrate, on an accelerated basis, Verizon Advanced Data Inc.'s ("VADI") advanced services assets into the Verizon Telephone Companies.[5] The Commission subsequently initiated a rulemaking to consider whether incumbent local exchange carriers should be treated as non-dominant in the provision of advanced services.[6] Subsequently, since 2001, Verizon has filed on an annual basis for the past six years a Petition to Extend Waiver of Section 61.42(g) of the Commission's Price Cap Rules for services transferred from VADI to the Verizon telephone companies. In the interim and to date the Bureau

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[5] / *Application of GTE Corporation and Bell Atlantic Corporation For Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Order, DA 01-2203 (rel. Sept. 26, 2001).

[6] / *FCC Initiates Proceeding to Examine Regulatory Treatment of Incumbent Carriers' Broadband Services*, Public Notice (Dec. 12, 2001). *See also, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17FCC Rcd 3019 (2002) ("Broadband Dom/Non-Dom NPRM")

has granted Verizon a total of six waivers over the past six years,[7] on the premise that proceedings to determine such regulatory treatment remains pending and therefore, the waivers remain in the public's best interest. In the most recent Order, the Bureau stated that certain regulatory issues have been resolved but continue to waive the Rules for Verizon without evidence of need such waiver is in the public interest. The Bureau ignores the fact that the FCC's decisions on such issues are on appeal.

POINT I

The Bureau Erred When it Granted Verizon's Request to Extend the Waiver Absent Evidentiary Support which Error Resulted in a Decision that is Arbitrary, Capricious and an Abuse of Discretion and the *Order* Should be Vacated.

The Bureau's conclusion that Verizon faces special circumstances with respect to its advanced services that warrant a temporary deviation from the Commission's rules, and that such deviation will serve the public interest, does not meet the standard "for good cause shown" enunciated under applicable case law or otherwise constitute reasoned decision making as discussed below.[8] First, the Bureau fails to acknowledge that some of the questions so called resolved by the Commission regarding the appropriate treatment of broadband services the Wireline Broadband Internet Access

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[7] / *See Verizon Petition for Interim Waiver of Sections 61.42(g), 61.38, and 61.49 of the Commission's Rules*, Order, 17 FCC Rcd 11010 (2002) (*"Sections 61.42(g), 61.38, 61.49 Waiver Petitions"); Verizon Petition for Interim Waiver of Section 61.42(g) of the Commission's Rules,* Order 18 FCC Rcd 6498 (2003) (*"Verizon Section 61.42(g) Waiver Petition"): Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon telephone Companies,* Order 18FCC Rcd 7095 (2004) (*"2004 VADI Waiver Order"); Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies,* Order, 20 FCC Rcd 8900 (2005) ("*2005 VADI Waiver Order*"); *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, Order, 21 FCC Rcd 6475 (2006) ("*2006 VADI Waiver Order*").

[8] / See *Northeast Cellular Telephone Co. v. FCC*, 897 F. 2nd 1164, 1166 (D.C. Cir. 1990) ("Northwest Cellular"); See also *WAIT Radio v. FCC*, 418 F 2d 1153, 1159 (D.C. Cir. 1969).

Services Order[9], and in Verizon's Petition for Forbearance from Title II and Computer Inquiry Rules[10] are being challenged in court. Despite the fact that Verizon still contends that a waiver is still necessary and appropriate here, the Bureau improperly relies upon the unsupported assertion that "...according to Verizon, only a "handful" of services are left in Tariff FCC No. 20 that are potentially subject to price cap treatment" and "...the burden to reincorporate these few remaining services into price caps is no longer significant"... "Given the immediacy of the approaching annual access filing deadline...we believe a waiver is warranted....."[11] The Bureau accepts and improperly relies upon these conclusory statements without evidentiary support and improperly concludes that "...to the extent that Tariff FCC No. 20 services are subject to Verizon's transition to non-common carrier offerings, we find it is in the public interest to grant Verizon a waiver to exclude these services from price caps so it may complete operational changes that affect the future provisioning of these services to its customers." Moreover, the Bureau did not request Verizon to produce the operational plans or any

[9] / Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14899-903, paras. 86-95 (2005) (Wireline Broadband Internet Access Services Order), petitions for review pending, Time Warner Telecom v. FCC, No. 05-4769 (and consolidated cases) (3rd Cir. Filed Oct. 26, 2005), which allowed providers such as Verizon to offer the telecommunications transmission component of their wireline broadband Internet access services on a common-carrier basis or a non-common carrier basis on a permissive detariffed basis if the provider so chose.

[10] / Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with respect to Their Broadband Services, WC Docket No. 04-440 (deemed granted by operation of law, effective March 19, 2006). *See, Sprint Nextel Corporation, et. al., v. FCC and USA*, Case No. 06-111, U.S. Court of Appeals for the District of Columbia Circuit.

[11] / *See I/M/O/ Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies,* Order DA 07-2367, (rel. June 6, 2007) ("*Order*") at ¶ 12.

other data to support the changes Verizon contemplates that are the stated underpinnings for seeking this waiver. [12] Six years is a long time to complete plans and changes.

Second, the Bureau fails to consider the public interest in its decision relying, instead, on the burden to Verizon at being "required to incorporate all of these services into price cap indexes" originally, six years ago.[13] The Bureau is acting without evidentiary support and ignoring the public interest, by considering only the burden faced by Verizon as support for its decision, Again, the Bureau merely accepted Verizon's blanket unsupported assertion. As the Bureau notes, "Verizon acknowledges that the appropriate regulatory status of most of these services is now settled." obviating the need for a waiver.[14] The Bureau's decision fails to consider the public interest and is based, by its own admission, on no evidence or data. A blanket and general assertion without any data, empirical or otherwise to support that assertion, is mere conjecture and the Bureau has the obligation to request and receive evidence to support the assertions of the party seeking a waiver from one of its rules. The lack of empirical support and evidence in the record precludes the Bureau from determining that a party has shown "good cause" and that the Bureau's *Order* is a reasoned decision. The Bureau grant of the waiver without evidentiary support should be vacated.[15]

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[12] / *Order* at ¶ 12.

[13] / *Order* at ¶ 12.

[14] / *Order* at ¶ 11.

[15] / *Order* at ¶10.

The Bureau in its *Order* asserts that Verizon no longer needs a waiver as it can offer the broadband services on a non-common carrier basis.[16] The Bureau now, after six years of waivers, asserts it was part of its original waiver to allow Verizon to avoid price caps, citing the reasons in its original waiver as supporting this sixth waiver.[17] In short, the Bureau's *Order* is *ipse dixit* reasoning and totally fails to provide any analysis or sufficient justification with actual evidence in the record to support the Bureau's action. There is no evidence in this record. The Bureau acknowledges there is no evidence produced by Verizon but that the Bureau is fulfilling the original plan of six years ago, relying on the reasoning of the original Order to justify this waiver.[18] The Bureau must justify its findings and conclusion as to each waiver, separately. Its failure to do so clearly evidences a decision making process that is arbitrary and capricious and lacking any "rational connection between the facts found and the decision made."

Historically agency interpretations of their own regulations and decisions are entitled to substantial deference. While this may be true, agency interpretations and decisions have been set aside where "it is the product of a decision making process deemed arbitrary or capricious, or if it lacks factual support." One of the standards for review of agency action is "whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made.[19] Moreover, the agency in support of its decision must clearly articulate the course of

[16] / *Order* at ¶7.

[17] / *Order* at ¶12.

[18] / *Order* at ¶12.

[19]/ See *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575-1576 (10th Cir. 1994); See also, *Necketopoulos v. Shalala,* 941 F. Supp. 1382 (SDNY 1996).

inquiry it followed, its analysis and the rationale behind its ultimate findings and decision.[20] The Bureau simply failed to explain why six years after a grant of the temporary waiver, full compliance with the price cap rules is not in the public interest.

Additionally, the Bureau's decision is arbitrary and capricious because it circumvents the purpose of price cap rules. Rate Counsel notes that the Commission's primary reason to adopt *Price Cap* Orders along with the *Access Charge Reform* and *Universal Service* Orders, was the need to continue to keep access charges in check, as competition hopefully increases and as the industry makes its transition to an access charge regime based on forward looking economic costs. However, given the current state of competition, price caps remain necessary. All the other RBOCs have complied with rate caps fully without the need for any waivers. Essentially, there is one rule for RBOCs and a special rule for Verizon as evidence by the grant of six waivers. Such waivers from price cap rules absent good cause substantiated by empirical data, creates the opportunity for Verizon to evade compliance with the price cap regime that other carriers comply with. The result is blatantly unfair to market competitors and consumers as well.

This result was never intended by the Commission since the *Price Cap, Access Charge Reform* and *Universal Service* Orders were adopted to provide a uniform requirement. Therefore, the Commission should not permit Verizon to continue to evade their legal obligation and responsibility, year after year, especially in light of the fact there is no supporting data presented by Verizon in its applications. The Bureau's decision is not supported by any underlying evidence or data, but only by Verizon's unsupported assertions and assumptions. Accordingly, the Bureau's *Order* is deficient in

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[20] / *Id.*

that it lacks a showing of "good cause" for the waiver and lacks a reasoned basis. Thus, the Bureau's action is arbitrary and capricious. Additionally, Rate Counsel submits that this waiver as granted and the prior waivers exceed the scope of delegated authority and the Bureau's actions are null and void under Section 0.291(a)(2) and (e).[21] As result, Rate Counsel asks that the Commission vacate the Bureau's *Order* in this matter and otherwise direct the Bureau to suspend, investigate, and enter an accounting Order related to the 2007 annual access tariff filing.

POINT II

The Bureau Erred in the Granting of all Six Waivers to Verizon Because the Bureau's Actions Exceed Its Authority and the Commission Should Vacate the Bureau's 2007 *Order* and Direct The Bureau To Investigate, Suspend, And Issue An Accounting Order As To The 2007 Filing And Initiate An Investigation As To Whether *Exogenous* Adjustments Are Necessary Due To The Regulatory Changes Implemented Since 2001 And To Remedy The Error In Granting Serial Waivers, Thereby Correcting The Harms To Consumers From Verizon's Perpetual Waivers.

The Bureau's *Order* granting Verizon a sixth waiver from compliance with Section 61.42(g) for its 2007 annual access tariff filing is simply wrong. By this grant coupled with the five prior waivers, the Bureau has permitted Verizon to circumvent the price cap regime the Commission has put in place. This latest waiver circumvents the Commission's price cap scheme by essentially creating one rule for Verizon and another rule for all other RBOCs, which is acknowledged by the Bureau in citing the reasoning in

[21]/ See 47 C.F.R. §§ 0.291(a)(2) and (e). Section 0.291 is a limitation on section 0.91. Under Section 0.291(a)(2), the Chief, Wireline Competition Bureau shall not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and quidelines. Under Section 0.291(e), Authority concerning rulemaking and investigatory proceedings, the Chief, Wireline Competition Bureau, shall not have authority to issue notices of proposed rulemaking, notices of inquiry, or reports or Orders arising of the foregoing . . . (the rest of the text discusses a carve out not related to this proceeding).

its initial waiver as a basis for a similar waiver, six years later.[22] In addressing the issue of *Access Tariffs* and *Price Cap Regulation*, the D.C. Court of Appeals, recently noted the history behind the *Price Cap Regime*. The Court stated that "prior to September 1990, local telephone companies (local exchange carriers or "ILECs") were subject to "rate-of-return" regulation in setting prices for interstate carriers to access their local telephone networks."[23] Under rate-of-return regulation, if a LEC earned more than was permitted by the regulated rate, the company was required to refund those over-earnings to its ratepayers. The refunds would be made in the form of an "add-back" to the period in which the over-earning occurred in Order to avoid distorting the LECs "current earnings" by any refund paid in the current period for past overcharges. Thus, it provides a clear picture of the LEC's current earnings.[24]

However, after September of 1990, "the Commission replaced rate-of return regulation for the largest LECs with … price cap regulation."[25] The Court observed that "[U]nder the price cap regime, "the regulator sets a maximum price, and the firm selects rates at or below the cap. [B]ecause cost savings do not trigger reductions in the cap, the firm has a powerful profit incentive to reduce costs.[26] The Court further noted that "[P]rice cap regulation is intended to provide better incentives to the carriers than rate-of-return regulation, because the carriers have an opportunity to earn greater profits if they

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[22] / *Order* at ¶12.

[23]/ *See Verizon Telephone Companies, et al., v. FCC,* at 3 (D.C. Circuit Court of Appeals, argued October 21, 2005, decided June 20, 2006,) ("*Verizon Telephone*").

[24] / *Id.* at 3-4.

[25] / *Tariff Order*, 19 F.C.C.R. at 14,950 ¶ 3; See also *Verizon* Telephone, *supra*.

[26]/ Id. at. 4; citing to *Nat'l Rural Telecom Ass'n v. FCC,* 988 F 2d 174, at 178 (D.C. Cir. 1993).

succeed in reducing costs and become more efficient."[27] However, "because the amounts of sharing or lower formula adjustment implemented in one year ... relate to productivity performance in a prior years,... unless add-back occurs, the relationship between the rate of return and productivity growth becomes hidden."[28] Moreover, in discussing whether the Commission has the authority to suspend tariffs, Order an accounting to track revenue earned under tariffs and determine whether or not the tariffs contain "just and reasonable rates the DC Circuit concluded that §204(a)(1), expressly authorizes the Commission to suspend a LECs rates and determine whether they are "just and reasonable."[29] Moreover, section 204(a)(1) of the Act provides that the "burden of proof....shall be upon the carrier." [30]

Rate caps, the price cap index, may be adjusted for "exogenous events/costs." The "exogenous cost" rule allows carriers to adjust price caps to account for "cost that are triggered by administrative, legislative or judicial action beyond the control of a carrier. See 1990 *Price Cap Order*, 5 F.C.C.R. at 6807. Exogenous costs affect the price cap index. Carriers' services are grouped into various baskets for which a maximum price, the price index cap ("PCI"), is determined. From the initial price cap, rates are

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[27] / Id. at 4; See *Bell Atl. Tel. Cos. V. FCC*, 79 F. 3d 1195, 1198 (D.C. Cir 1996). Example of the Price Cap formula: a price cap LEC opting for an X-factor of 3.3 percent and earning a rate of return above 12,25 percent was required to share half of earnings above 12.25 percent and all earnings above 16.25 percent with its access customers. [*LEC Price Cap Order*, 5 F.C.C.R. at 6801 ¶ 125.] For LECs that elected a more challenging 4.3 percent factor, 50 percent sharing began for rates of return above 13.25 percent, and 100 percent sharing began at rates of return above 17.25 percent. [*LEC Price cap Order*, 5 F.C.C.R. at 6787-88 ¶¶ 7-10.] "Thus, a LEC that selected a 4.3 percent X-factor would have to initially cut rates more than a competitor that selected a 3.3 percent X-factor, but could keep a greater percentage of its earnings." *See Verizon Telephone* at 5-6.

[28]/ *Verizon Telephone* at 7-8 and citing to *Price Cap Regulation of Local Exchange Carriers*, 10 F.C.C. R.5656, ¶¶ 4, 16 (1995) (*Add-Back Rulemaking Order*).

[29]/ *Verizon Telephone* at 2, 12-17.

[30]/ *Id.* at 21

adjusted annually based upon inflation and expected productivity advances. PCI adjustments due to exogenous costs remain in place. Previously, the Commission's sharing rules also could affect PCI but sharing was eliminated in 1997.

As noted by the Bureau, its predecessor, the Common Carrier Bureau, granted the re-integration of Verizon's VADI assets back into Verizon on September 26, 2001. On November 30, 2001, Verizon filed its first waiver from section 61.42(g). For the reasons discussed above, the Bureau's action since 2001 exceeded its authority under sections 0.291(a)(2) and (e) and the waivers should be declared null and void. The re-integration Order and other Commission actions since 2001, including the waiver of section 61.42(g) implicate changes that could and should trigger review, suspension, and investigation of price cap filings and the investigation of exogenous cost events. The Bureau has repeatedly granted these waivers without taking any steps to suspend and investigate the annual access tariff filings. As a result, the Commission should vacate the Bureau's 2007 *Order* and direct the Bureau to investigate, suspend, and issue an accounting Order as to the 2007 filing and initiate an investigation as to whether *exogenous* adjustments are necessary due to the regulatory changes implemented since 2001 and to remedy the errors in granting serial waivers, thereby correcting the harms to consumers from Verizon's perpetual waivers.

POINT III

The Bureau Erred When it Granted Verizon's Request to Extend the Waiver Absent A Showing of Good Cause and Therefore, the *Order* Should be Vacated

This is the sixth waiver granted by the Bureau which essentially results in modification of the price cap regime not by Commission Order but by Bureau action in derogation of the Bureau's delegated authority. The Bureau Authority to grant waivers id delegated under section 0.91 of the Commission rule and section 1.3 sets forth the standard for grant of a waiver. A waiver may be granted "if good cause therefore is shown." A waiver is appropriate and may be granted in a situation where a petitioner asks for relief from meeting general standards established pursuant to rulemaking where the petitioner can demonstrate specific facts that make strict compliance inconsistent with the general standard and deviation from the general standard is in the public interest. "The agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation."[31] The Bureau has failed to demonstrate "good cause" or those special circumstances that allow Verizon to deviate from the general standard.

There has been no evidence presented or demonstration by the Bureau in its *Order* that it is good policy to allow Verizon to operate in effect without regard to section 61.42(g) when other parties have operated in full compliance with all rules applicable to filing of annual access tariff filings. Granting Verizon serial waivers from rules other

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[31]/ See *Northeast Cellular* at 1166.

competitors are forced to and regularly comply with is not sound public policy, an essential element for granting a waiver in the first instance.

Much of the reasoning relied upon by the Bureau in granting the waiver to Verizon is based upon the regulatory history of the past five years. The fact that the FCC has failed to decide regulatory issues that Verizon asserts causes it hardship is not supported by any empirical support or evidence. Saying it is so is not the same as proving it is so. A waiver can only be granted for good cause shown and which otherwise are in the public interest. Waivers require a factual basis with record support. In this record, there is no evidence or empirical support adequate to grant a waiver. Verizon argues that to comply with the Tariff 20 obligations for those few customers who Verizon hs not shifted from Tariff 20 service are too burdensome to be in the public interest. As a result of the waivers granted, it is difficult to understand, much less determine the burden to the consumer and cost to the ratepayers by the fifth serial grant of waiver. Six successive years of waivers, in themselves, raise serious questions with respect to the facts relied upon to show "good cause."

Ultimately, the Bureau lacks evidence as to what effect including the VADI services into the price caps will have. It has been six years that these services have enjoyed a waiver from price cap filing requirements. Although Verizon claims that it has made significant progress in implementing other changes to implement recent regulatory developments and that it would be a waste of resources and not in the public interest to rush the process, there is nothing more than unsupported assertions without support or empirical evidence backing up these claims in the record.[32] Essentially, if Verizon's arguments could be shown to be correct, Verizon is really seeking a rule

[32]/ *Order* at ¶ 11.

change that asks to amend the price cap regime as it applies to Verizon. The very fact that regulatory developments have occurred implicate the limitation on the Bureau's authority under section 0.291(a)(2), as discussed above. The full Commission sets policy not the Bureau by granting seriatim waivers.

Ultimately, by grant of this sixth waiver, the Bureau is in effect amending the price cap regime and circumventing making those changes through a rulemaking. The point of a rulemaking process is to establish a general rule that is applicable to the whole. Waivers are exceptions to be granted only under specific circumstances where "good cause" is demonstrated by the evidence and the waiver will benefit the public. Neither has been demonstrated by Verizon in this proceeding.

CONCLUSION

In view of the foregoing, the Ratepayer Advocate respectfully asks that the Commission to:

(1) vacate the *Order*,

(2) direct the Bureau to suspend, investigate and issue an accounting Order for Verizon's 2006 annual access tariffs filing and initiate an investigation as to whether *exogenous* adjustments are necessary due to the regulatory changes implemented since 2001 and to remedy the error in granting serial waivers, thereby correcting harms to consumers from the grant to Verizon of perpetual waivers, and

(3) grant such other relief as the Commission deems appropriate.

Respectfully submitted

RONALD K. CHEN
PUBLIC ADVOCATE OF NEW JERSEY
KIMBERLY K. HOLMES
ACTING DIRECTOR
DIVISION OF RATE COUNSEL

By: *Christopher J. White*
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Deputy Public Advocate
James W. Glassen, Esq.
Assistant Deputy Public Advocate

Dated: June 28, 2006